

MONTANA LEGISLATIVE HISTORY

Chapter 375 19 74

Bill H 1101 S _____ Original bill & history C

H. Committee on Natural Resources

Hearing Date(s) Feb 14 ✓ C

Feb 16 ✓ C

_____ C

_____ C

Date Out Feb 16 ✓ C

S. Committee on Judiciary

Hearing Date(s) Feb 28 ✓ C

Mar 06 ✓ C

Mar 07 ✓ C

_____ C

Mar 07 ✓ C

Did this bill originate in an interim committee? Yes No

Committee _____

Report _____

During questions from the committee the sponsor and supporters were complimented for having worked out any problems ahead of time.

Chairman Sheldon asked if the committee would like to consider this bill at once. Rep. Lucas moved that HB 1005 do pass. The motion carried unanimously (Rep. Swanberg was absent at the time of the vote).

HB 1014 Rep. Bradley, the chief sponsor, was the first to speak. She stated this was an amendment to the definition of strip mining to include preparatory work; and preparatory work includes construction of railroad spurs, fabrication of draglines and loading shovels, and construction of buildings to house mining operations. She said this bill was introduced as a response to the general attorney's opinion which was requested by Ted Schwinden, director of state lands. As the definition now stands an operator does not engage in strip mining until he actually starts the removal of the overburden. Rep. Bradley said Mr. Schwinden had requested this bill be held to compare it with a similiar senate bill.

Joe Crosswhite, Operating Engineers, spoke in opposition to the bill. He said his people have had it rather rough in the past years; and the preparatory work, like the building of railroad spurs at Sarpy Creek, have kept from 50 to 225 men at work during the past year. He feared this would also hold up the issuance of licenses and so opposed the adding of this to the strip mining act.

Gene Phillips, Decker Coal, was the next speaker. He signed a statement to amend. He stated the fabrication of draglines is done out of state but will be done on the site at a future time.

Questions were asked by the committee.

Chairman Sheldon said the bill would be held until it could be compared with the similiar senate bill.

Pat Hooks, Montana Coal Council, signed a statement to amend.

HB 1101 Rep. Schepens, the chief sponsor, was the first to speak. He said this was a short simple bill to revise the list of public uses for which the right of eminent domain may be exercised. He said what they are doing in this bill is clarifying the use of reservoirs for the storing of water--it is for agricultural use and public water supplies. He said this legislation comes from concerned people in eastern Montana.

Kit Muller, Northern Plains Resource Council, was the next proponent speaker. He passed out a copy of an amendment he would like to have considered. This is exhibit 3. A copy of the "Articles of Incorporation of Montana Water Storage Co." from which most of his testimony was taken is exhibit 4. He questioned the permitting of corporations to condemn private property for the purpose of developing their own reservoirs. He urged consideration of this bill.

Ellen Withers said she would like to testify in support of this bill and in support of the amendment to make it consistent. She said the power of eminent domain should be used only for the people of the state--she

said we stand on the threshold when this power can be so broadly exercised that it will endanger our freedom. Without safeguards there is a class of people who would use the power for speculative purposes and personal profit.

Louise Cross, Constitutional Convention Delegate, Chairman of the Natural Resources and Agricultural Committee, was the next proponent speaker. A copy of her testimony is exhibit 5.

Paul Smith, Montana Stock Growers, was the next proponent speaker. He was also concerned with the misuse of the power of public domain--felt it should be clarified so industrial users could not take advantage of it. He said the way it is stated anyone can go out and condemn water--as all uses can constitute a public use. He said he felt the constitutional provision was drafted for worthy purposes and the legislature should delineate what the powers are and what is going to be public domain.

Zane Parker, rancher from Yellowstone Co., stated his concern was with high voltage lines in eastern Montana and the condemnation of land for these lines which amounted to 36 acres out of each section as they took a 300 foot corridor. He asked that the right of eminent domain only be permitted when it profits the people of Montana--not when an industry wants to use it for profits.

Peter Pauly, Montana Dakota Utilities Co., Intake Water Co., Montana Water Storage Co., Montana Water Reserve Co., was the first opponent speaker. He said the concept of this bill is inconsistent with Montana's way of doing things. In the past he said industries have been encouraged to expand and grow. He said one way water can be conserved is by reservoiring it when the demand is low and then using it when the agriculture demand is high. He said water companies he represents have organized for the purpose of gathering water. They are in existence to serve the needs of the community. He said to get a condemnation you must show the courts it is necessary and give just compensation.

Bob Corette, Montana Power, the next opponent speaker stated there is a question about the water part of this bill being constitutional. He said HB 1009 covers the part covered on page 3 and 4 of this bill and that there is another bill passed by the judiciary committee dealing with the same subject; and he suggested striking duplicating sections from this bill.

Rep. Schepens had a short rebuttal in which he said we should be interested in preserving Montana for Montanans.

Questions were asked by the committee. Mr. Muller responded that parts of the bill were similar to HB 1006. Mr. Pauly responded to a question concerning the reservoirs they plan to build in eastern Montana that a system of priorities would be set up and supply and demand would dictate what would be charged.

Chairman Shelden opened the meeting to a consideration of the following bill:

HJR 58: Rep. Lucas moved that it be amended on page 2, line 19 by adding the words "sell or" before the word "abandon"; and to change "on July 1" to "by Nov. 1" on line 20; and in the title, line 6, to add "sell or" before the word "abandon"; and as so amended do pass. Motion passed unanimously.

Ex. 3

Kit Muller

Proposed amendment to HB 1101 (An act reviving the list of public uses for which the right of eminent domain may be exercised):

Amend Section 5, line 2, appearing on page 3 of the corrected introduced copy, by inserting the following phrase:

"for agricultural use and public water supplies."

The amended section would then read:

- 1 mines, mills, or smelters for reduction of ores, and sites
- 2 for reservoirs necessary for collecting and storing water.
- 3 for agricultural use and public water supplies.

8

Ex. 4 Kit Miller

STATE OF MONTANA
FILED
DEC 19 1973
FRANK MURRAY
SECRETARY OF STATE
By *[Signature]*
Deputy

ARTICLES OF INCORPORATION
OF
MONTANA WATER STORAGE CO.

We, the undersigned natural persons, being of the age of 21 years or more, acting as incorporators of a corporation under the Montana Business Corporation Act, adopt the following Articles of Incorporation for such corporation:

FIRST: The name of the corporation is Montana Water Storage Co.

SECOND: The period of its duration is perpetual.

THIRD: The purposes for which the corporation is organized are:

(1) To appropriate and divert, by any appropriate means and structures, water pursuant to the laws of any state or country, and to sell, rent, lease, purchase, acquire, exchange, pump, transport, move, carry, convey by all appropriate means, and otherwise deal in and with, and dispose of, mortgage and hypothecate water and water rights, and to impound, dam, reservoir and store water by any appropriate means and structures whatsoever, and to acquire, purchase, own, sell, rent, lease, convey, mortgage, hypothecate, pledge, exchange, encumber, and otherwise deal in, possess and dispose of property of every kind and nature, real, personal and mixed, including water and water rights, easements and rights of way, and to exercise the rights of eminent domain and condemnation pursuant to the laws of any state or country, for any purpose whatever in the course of

The total amount requested, as above noted, is 675 cfs for reservoir supply purposes, and 55 cfs for direct flow appropriation. For storage purposes the total amount requested is up to 130,000 acre-feet per year, and for direct flow appropriation up to 40,000 acre feet per year.

As far as applicant's place of use is concerned for sale, rent, and distribution of water, the place of use will be as set forth on the maps hereto attached for applicant's diversion works, pipeline, reservoir, and related facilities.

- 8.(a) The property owner at the point of diversion will be applicant. At the present time, however, this property is privately owned by a person other than applicant.
- 8.(b) The property owners at the places of use for applicant's customers will be the customers themselves. The property owner at the places of use of applicant for its diversion works, pipeline, reservoir, and related facilities will be applicant. Such property, at the present time, however, is privately owned by persons other than the applicant, with the exception of Section 36, Township 1 South, Range 43 East which is state land.
- 8.(c) Applicant will acquire the property needed for its diversion works, pipeline and reservoir by private negotiations with the present owners thereof, and if this fails, by eminent domain or condemnation. If a right-of-way or special-use permit cannot be obtained from the state by application therefor for Section 36, Township 1 South, Range 43 East, (for the reservoir site) a dike will be erected to prevent the reservoir from encroaching on state land. No federal land is involved.
- 10. Applicant is a Montana corporation created and owned by Montana residents for the purpose of preserving and utilizing Montana water for Montana people. Applicant's development, if authorized, will put a substantial portion of Montana's allocated Tongue River Yellowstone Compact water to a beneficial use within this state.

irrigation, and municipal uses or purposes, applicant will provide its customers with industrial water and there will be a reserve in applicant's reservoir of 2,000 acre-feet which it is planned will be used for fish and wildlife and recreational uses or purposes. The amount of water applied for is necessary to meet present or reasonably anticipated needs in the area to be served.

The total amount requested, as above noted, is 500 cfs for reservoir supply purposes, and 50 cfs for direct flow appropriation. For storage purposes, the total amount requested is up to 91,000 acre-feet per year, and for direct flow appropriation up to 36,200 acre-feet per year.

As far as applicant's place of use is concerned for sale, rent and distribution of water, the place of use will be as set forth on the maps hereto attached for applicant's diversion works, pipelines, reservoir, and related facilities.

- 8.(a) The property owner at the point of diversion will be applicant. At the present time, however, this property is privately owned by a person other than applicant.
- 8.(b) The property owners at the places of use for applicant's customers will be the customers themselves. The property owner at the places of use of applicant for its diversion works, pipelines, reservoir and related facilities will be applicant. Such property, at the present time, however, is privately owned by persons other than the applicant, with the exception of Section 16, Township 6 North, Range 48 East which is state land.
- 8.(c) Applicant will acquire the property needed for its diversion works, pipelines and reservoir by private negotiations with the present owners thereof, and if this fails, by eminent domain or condemnation. In the case of the state land (Section 16, Township 6 North, Range 48 East), an easement will be requested. No federal land is involved.
10. Applicant is a Montana corporation created and owned by Montana residents for the purpose of preserving and utilizing Montana water for Montana people. Applicant's

Getty Oil Company - Applicant

7.(a) 1., 2., 3., 4., and 5. (continued)

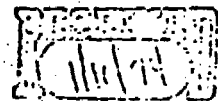
Planning in such matters will proceed soon after a permit has been granted. The irrigation of reclaimed lands will be new rather than supplemental irrigation.

7. (b), 1., 2., 3., 4., and 5.

Applicant will be engaged in the business of utilizing the area's coal resources to help provide energy for the nation. As such, the primary water use will be industrial. However, it would be irresponsible to plan such development without also providing municipal and domestic water for persons associated with the industry. Also, the applicant desires to permit maximum use of the facilities for recreation, fish and wildlife purposes. Place of use for recreational, fish and wildlife purposes will be at the proposed reservoir. Places of use and amounts of use for other purposes cannot now be determined. All uses under this permit will be within the area outlined in red on the second of the two accompanying maps.

8. (c) Applicant will acquire the property needed for diversion, conveyance, storage and water use facilities by private negotiations with the owners thereof. A small amount of State land in S.16, T.18 N., R.56 E., is involved, and an easement will be requested. If this easement cannot be obtained, water will not be permitted to encroach on this area.

MONTANA WATER STORAGE CO.
P.O. Box 1115
Billings, Montana
59103



December 26, 1953

*6-11-54 - No
Action required
J.G.*

Rocker Six Cattle Co.
Forsyth, Montana

Attention Mr. Wallace McRae, President

Gentlemen:

In the past few days Winston L. Cox, James W. Eger and I (Jase O. Norworthy) have caused the incorporation of a new Montana company under the name of Montana Water Storage Co. This new company has filed an Application for Beneficial Water Use Permit. The permit would be for water from the Tongue River diverted at a location in Section 28 of Township 1 South, Range 44 East, Rosebud County, Montana, and stored in a reservoir to be constructed on Lay Creek.

This reservoir and diversion works would of necessity involve some lands owned by you. Because we became convinced that Montana's unused, yet allocated, portion of water under the Tongue River-Yellowstone compact was substantial and might be shortly subjected to applications in other jurisdictions and for beneficial use out of the State of Montana, we have had to work without disclosing our purposes to anyone. Having now filed the permit application, we do wish to be the first to inform you of our action and of the possible effect it may have on some of your lands. We would like to quote to you from the application, paragraph 3. (c), "Applicant will acquire the property needed for its diversion works, pipelines and reservoir by private negotiations with the present owners thereof, and if this fails, by eminent domain or condemnation" (emphasis added).

The purpose of this letter is two-fold: We wish to be the first ones to inform you of our action, and, secondly, to emphasize our sincere desire to pursue to your satisfaction and ours a private negotiation of the lands involved which belong to you.

We anticipate a natural concern on your part, but ask that you defer judgement until we have had an opportunity to visit with you. We hope to be able to arrange such a visit in the coming days.

Sincerely,

MONTANA WATER STORAGE CO.

Jase O. Norworthy
Jase O. Norworthy

SEP 24 1973

Potential Storage Sites

Name of Storage Site	NORTHERN PLAINS RESOURCE COUNCIL Stream and Location	Approximate Site Capacity (AF)			Average Annual Inflow A.F.	Critical Year Inflow A.F.	Estimated Avg. Ann. Sediment A.L.	Water Surface Area At		Approximate Cost (1973)	Alternatives for/or Remarks
		At Maximum	for Flood Spill	for Active Storage				Normal Pool	Minimum Pool		
Allanapur	Yellowstone Ab. Livingston, MT	4,000,000	50,000	1,830,000	2,692,000	1,642,000	3,800	31,900	20,400	\$145,550,000	
Liana	Yellowstone R. Nr. Bighorn, MT										
Yankee Jim	Yellowstone R. Nr. Gardiner, MT										
Wannigan	Yellowstone R. So. of Liv., MT										
Buffalo Creek	Offstream Nr. Custer, MT	72,700						1,900		36,600,000	
Cedar Ridge	Offstream Nr. Hysham, MT	126,800						4,700		24,210,000	
Sunday Creek	Offstream Nr. Miles City, MT	678,000						13,700			
Lignite Creek	Offstream Nr. Miles City, MT	30,000									No information.
Sweeney Creek	Offstream Nr. Forsyth, MT	116,000									No information.
Nyon Creek	Offstream Nr. Miles City, MT	150,000									No information.
Tullock Creek	Offstream Nr. Bighorn R., MT										
Hunter Mountain	Clarks Fork Yellowstone, WY	130,000		127,000	236,000	166,000	160	1,900	170	16,075,000	
Thief Creek	Clarks Fork Yellowstone, WY	200,000		190,000	459,000	312,000	310	1,160	730	44,230,000	
Raldrige	Clarks Fork Yellowstone, WY	14,600		10,200	629,000	418,000	120	220	140	9,975,000	
Sunlight	Sunlight Creek, WY	50,000		48,000	88,000	66,000	140	1,550	150	4,130,000	
Roachud Creek	Roachud Cr. 8 Mi. NE Colstrip, MT										
Natural Bridge	Boulder River, MT										
Wilsall	Shields R. Nr. Wilsall, MT										
Shields R. Storage	Potter Cr. Nr. Wilsall, MT										
Bruckett Creek	Bruckett Cr. Nr. Livingston, MT										
Custer	Bighorn R. Nr. Mouth, MT										
Little Bighorn	L. Bighorn S.17, T.9S., R.34E., WY	65,000		62,000	106,000	65,000		1,150	180	27,950,000	
Buffalo Bill Enlgt.	Shoshone R. Ab. Cody, WY	710,000	13,000	647,000	916,000	620,000	700	9,780	1,360	26,250,000	
Owl Creek	Owl Cr. Nr. Lodgegrass, MT										
Arvada	Poudre R. Nr. Arvada, WY	1,255,000	250,000	275,000	196,000	136,000		18,000	13,900	72,400,000	Alternate for Moorhead.
Hole-in-the-Wall	Middle Tk. Powder Ab. Kaycee, WY	55,000		45,000	52,000	26,000	80	1,180	260	11,850,000	Private development being considered.
Moorhead	Poudre River Nr. Moorhead, MT	1,130,000	250,000	275,000	320,000	79,000	8,100	18,500	6,200	58,200,000	
Pumpkin	Poudre River Nr. Pumpkin Cr., WY	1,000,000									
Lower Clear Creek	Clear Cr. Nr. Powder River, WY	602,000									
Lower Crazy Woman	Crazy Woman Cr. Nr. Powder R., WY	450,000									
Box Elder	Box Elder Cr. Nr. Ucross, WY	54,500								29,660,000	No natural inflow.
Beaver Creek	Beaver Cr. Nr. Newcastle, WY (Cheyenne River)	55,000		45,000	22,800						
Rockwood	Tongue R. 8 Mi. SW Dayton, WY	113,000			127,000	72,000					
Stateline Res.	Tongue R. at Wyo-Mont. Line	203,600		195,600	307,000	137,000		5,260	700	27,467,000	
New Tongue	Tongue R. at 4-Mile Cr., MT	320,000		316,000	300,000	110,000	340	7,600	250	42,750,000	Under consideration by private utilities.
North Prairie Dog	Prairie Dog Cr. Nr. Mouth, WY	39,900		36,400	23,600	4,600		1,285	270	17,030,000	
Mill Iron	Box Elder Cr. Nr. Baker, MT	45,000		40,000	57,000	4,690	260	1,350	(70)	8,865,000	
Nedora	Little Missouri Nr. Nedora, ND	332,000		217,000				18,700	6,500	34,240,000	
Wagon Creek	Little Missouri Nr. Camp Crook, SD	230,000	119,000	76,000	108,500						
Marmarth	Little Missouri Nr. Lower Coyote Cr., ND			240,000	196,000						
Deep Creek	4 Mi. Upstream from Lt. Missouri, ND			64,600	11,400						
Beaver Creek	Beaver Cr. 2 Mi. from MT Line, ND			55,200	21,800						
Brocheo	Knife River, ND	106,000	40,000	95,000	44,000	2,000	110	4,650	1,000	21,300,000	
Emison	Knife R. Nr. Crooked Cr., ND			41,800	19,900						
New Versippi	Green River, Upper Axis, ND	16,000									Dickinson and Heart Potts exist on Heart River.
Mott	Cannonball R. Ab. Mott, ND	230,000	85,000	226,000	32,000	1,000	30	10,800	650	21,980,000	Alternative for Cannonball
Cannonball	Cannonball R. Nr. Mott, ND	389,000	307,000	80,000	54,000	4,700	60	2,950	600	14,400,000	
Pently	Cannonball R. 3 Mi. SE New Leipzig, ND			97,000	51,300						
Regent	Cannonball R. Nr. Regent, ND			36,000	73,200						
Wettinger	Cedar River Nr. Wetlaht, ND			22,700	15,000						
Thunderhawk	Cedar Creek, ND	258,000		253,400	32,000	600	50	9,200	600	13,240,000	
Bixby	Morreu R. 1 Mi. So. Bixby, SD	90,000									
Bendall	Green River, WY	495,000		440,000	370,000		50	15,000	3,000	26,150,000	To permit Colorado River basin exports.

WITNESS STATEMENT

6X.5

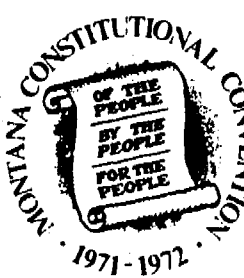
Name Louise Cross
Address 1510 E. Ames, Glenview
Representing Constitutional Convention
Chairman - Nat. Rec. & Ag Comm.
Which Bill? 1101

Date 2-14-74
Support? ☒
Oppose? ☐
Amend? ☐

Comments:

Prepared statement will deal with the
intent of Art. IX, sec. 3, subsec. 2

Please leave prepared statement with the committee secretary.



MONTANA CONSTITUTIONAL CONVENTION

STATE CAPITOL

HELENA, MONTANA 59601

TELEPHONE 406/449-3750

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LOUISE CROSS
Delegate, District 3
Chairman:
Natural Resources and
Agriculture Committee

TO: HOUSE NATURAL RESOURCES COMMITTEE
CHAIRMAN: ARTHUR H. SHELDON

FROM: LOUISE CROSS, Chairman, Committee on Natural
Resources and Agriculture, Constitutional
Convention, 1972

RE: HB 1101 as related to Article IX, Sec. 3 (2) Water Rights

Mr. Chairman, Members of the Committee:

In the interim of time when the Delegates to the Constitutional Convention adopted the new document and before it went to the voters of the state, there were many analyses made of the New Constitution.

Although most of the public discussion was centered on other articles in the two months before the election, the provisions of Article IX, and particularly the Water Rights section were considered by a number of analytical writers. It was called a key provision, important to Montana's future.

This was, of course, precisely the conclusion of the committee at the time of its writing and at its adoption. It was quite clear to me, and to most of the committee members, that the development of Montana would hinge directly through the use of its water--whether that development would occur in its major economy of agriculture, its second economy, recreation, or in industry.

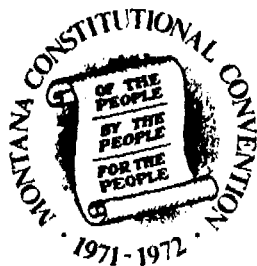
Section 3, subsection 2 (Water Rights) is essentially the same as Sec. 15, Art. III of the 1889 Constitution. When the Natural Resources report went to the Committee of the Whole, the wording was identical. The Committee on Style and Drafting made some minor grammatical revisions which did not alter the meaning of the section as it existed. It was stated at the time, and it was reiterated again by those who studied the section later, that the purpose of the retention of the section was to protect what existed, or what may exist.

The vote on the final consideration by the delegates on this section was 90 to 3.

Louise Cross
Prior to preparing this statement, I spent several hours going through my personal files of notes, records, and correspondence. I wanted to be very careful that my memory was serving me correctly. I was asked what was the intent of the committee on this particular section. My reply has direct bearing on HB 1101, it seems.

I can assure you that it was not the intent of the committee to make it possible for the Getty Oil Co., or any other company, for that matter, to invoke the power of eminent Domain as a constitutional

cont.



MONTANA CONSTITUTIONAL CONVENTION

STATE CAPITOL

HELENA, MONTANA 59601

TELEPHONE 406/449-3750

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2.

right. For a private company to declare that collecting and storing water for its own use is a public use, is stretching the imagination beyond all reasonableness. The interpretation is strictly its own and not that of the Con-Con committee, and many of the delegates.

Subsection 2 was retained to preserve the number of court decisions that had been made interpreting the language, and the application of the section.

Further, in my notes, there is nothing that applied subsection 2 to industrial use. Nor do I recall any discussion with the committee that did, either. The over-riding concern was to make sure that sufficient water was available for agricultural use, and that there would be adequate water for domestic and municipal supplies. To interpret this in any other way is erroneous, and I might add, is an intimidating legal maneuver.

Eminent Domain, a power reserved by the people to its representative government, is a power that must be used prudently. Otherwise, it becomes dangerous and oppressive. Precise definitions of what constitutes a public use is essential if private citizens are to have a measure of protection from excessive demands by either industry, or government.

HB 1101 is concerned with precise definitions. And well that it should be. The addition of the underlined words in the bill clarifies, and re-affirms the intent of the language on Water Rights Section 3, subsection 2, Art. IX of the new constitution.

This committee may be interested to know, that I received (middle of a phone call from a gentleman working on the constitutional revision of the Texas constitution. Their committee on natural resources was studying Art. IX in our constitution. While they were very much interested in the environmental section, and land reclamation, there were also some questions about water and water rights. I advised him to do everything in his power to secure the latter. If other states are following our lead, then, as representatives of Montana citizens, you have much to live up to. I sincerely hope that you will do so. Jan.)

Thank you.

WITNESS STATEMENT

Name PETER C. PAULY

Date 2-14-74

Address 833 N. MAIN Helena, Mont.

Support ?

Representing MONTANA-DAKOTA UTILITIES CO.

Oppose ? ✓

Which Bill ? HB-1101

Amend ?

Comments:

Also representing: Intake Water Co.
Montana Water Storage Co.
Montana Water Reserve Co.

Please leave prepared statement with the committee secretary.

Rep. Lien made a motion to move Rep. Swanberg's amendment dealing with condominiums to page 10, line 17 and be a new subsection "g". This motion carried unanimously with the same absent as before.

Two other housekeeping amendments made by the committee were on page 22, line 13 to insert "shall" before the word "affix"; and on page 2, line 18 following the word "transferring" to put a comma, and to put a comma also after "transfer" on line 19.

Rep. Schepens moved that HB 1017 as amended by the subcommittee's amendments, the two housekeeping ones in the paragraph above, and the ones moved on earlier receive a do pass. The motion carried with Rep. Lucas being the only no. Lucas and Bradley had paired and Harper left his written vote favoring the bill.

HB 875: Rep. Huennekens said there was a little clean-up needed and the subcommittee had come up with a number of amendments. They would use the term suspension instead of moratorium of critical rural subdivisions. He said while sections 4 1/2 miles around cities would be exempt, he had had requests from several cities that the suspension be drawn in to their very outskirts. He said classifications would be based on productivity of land. The idea is to keep our most valuable lands from going into subdivisions at least until we decide whether they should or should not be protected for agriculture. He said blocks of land 240 acres or less and divided into not more than 5 parcels would be exempt if not included in the 1 to 4 classes of agriculture. This was to allow some sort of subdivision but to exclude the big ones. There can also be an exemption if a compelling public need is shown, but this too must not include any of the top four agricultural classified lands.

HB 1016: Rep. Shelden stated the only purpose of this bill is to define "subdivision". Rep. Swanberg suggested the bill be amended by taking the definition of subdivision out of HB 1017 and putting it in this bill and to also amend the title to conform. Since there is a possibility that the definition in 1017 might be changed in the legislative process it was the feeling of the committee that it would be safer to phrase it like this "Subdivision has the same meaning as the word is defined in section 11-3861(12)." Rep. Harper moved that HB 1016 as so amended do pass. The motion carried with Rep. Lundgren voting no and Rep. Lucas absent.

HB 1101: Rep. Schepens moved an amendment on page 3, line 2 to read "for agricultural use and public water supplies," which was just a housecleaning amendment to make it conform. Motion passed unanimously (Lucas absent). Rep. Schepens moved that HB 1101 do pass as amended. Rep. Lien seconded it. There was discussion by the members. Rep. Lien moved a further amendment on page 2, line 17, following the word "supplies" by inserting "or which is to be used solely for hydroelectric generating of power." The motion carried with Rep. Bradley voting no, Lucas absent. The committee then took up Rep. Schepens motion of do pass as amended. The motion passed unanimously with Rep. Lucas absent.

Meeting adjourned at 12:30 PM.

Respectfully submitted,


ARTHUR H. SHELDEN, Chairman

ROLL CALL

SENATE JUDICIARY COMMITTEE

SECOND HALF - 43rd LEGISLATIVE SESSION 1974

Date 2-28

NAME	PRESENT	ABSENT	EXCUSED
Luke McKeon	✓		
Pat Gilfeather	✓		
Paul Boylan	✓		
Mrs. Boots Hall			✓
Miles Romney	✓		
Glenn Drake	✓		
Tom Harrison	✓		
Jim Moore	✓		
Jean Turnage	✓		

BILL NO.

VISITOR'S REGISTER

(Please leave prepared statement with Secretary)

to serve the people between communities, and that it is self defeating.

Mr. Loble felt that this was a "shotgun approach" aimed at preventing all types of condemnation on just utility sites. He felt that ranchers needed to have a right of access and that this statute prevented all rights of eminent domain, allowed the government to stop all condemnation, and interrupted a siting plan if an error was discovered at a later date.

Mr. Phillips said this would force utility companies to commit their money to far in advance, and yet would not guarantee rights to the land site. This would also jeopardize the hiring of equipment manufactures.

Mr. Brenner said that he opposed the bill for the above reasons.

In his closing statements, Representative Driscoll said that this bill covered the Water Use Act, the Hard Rock Mining Act, Rivers and Harbors Act, and all national Environmental protection acts. This would not stop condemnation but would require land authorization before condemnation was granted.

HB 1101--Witnesses: Representative Henry Schepens, District 3
Kip Mueller, Northern Plains Resource Council
Paul Smith, Montana Stockgrowers
Tom Monforton, National Farmers Organization
Senator Henry Siderius
Lester Loble, Int. Water Company
Bob Coldiron
Gene Phillips, Pacific Power and Light
Representative Bob Brown, District 16

Representative Schepens, sponsor, said this would revise the list under which eminent domain may or may not be used for, and revise the list for citing acts.

Mr. Mueller said that two corporations, Montana Water Storage and the Water Reserve Company were given authorization to obtain water use permits. The intent of application was to get a reservoir. This bill would take away power of eminent domain from non-governmental entities, but would not effect strip mining of coal in eastern Montana.

Mr. Smith, supporting the bill, felt that power of eminent domain should be vested only in public use, of water, water supplies, and utility sites.

Mr. Monforton also supported the bill, and Senator Siderius said that this bill would protect individual rights. He submitted an attachment from CONCON.

Mr. Loble, opposing the bill, felt if the water is not appropriated, bordering states could claim rights to it. By limiting this, only small reservoir would be able to build. This bill would preclude investigators to sell

surplus water to industries, and Montana would lose all the benefits to the reservoirs. Another effect of the bill would be if a person wanted to stop coal gasification, all he would have to do is refuse to sell. Water rights could be condemned by another condemnor if they had higher public priority. He submitted a brief on a constitutional argument on the bill.

Mr. Corette, also opposing the bill, felt that the material concerning section 70-803 in the bill on page 3, lines 15 and 16, and page 4, lines 8 through 10 should be omitted, since this was already covered in another bill. He felt that in limiting use only to the public, and agriculture, they would not let water flow into the next state.

Mr. Phillips said that eminent domain should balance needs of those of the society and those of the individual. He felt this bill would allow one person to obstruct those needs of the society.

Representative Brown, supporting the bill, said that the power of eminent domain is already vested in the government. The question is when and how should the legislature exercise these powers. This pertains to small landowners and water speculators who would sell to coal developers.

1009--Witnesses: Representative Bardanouve
Ted Doney, Natural Resources Council

Representative Bardanouve said that this bill corresponds with HB 965. This bill addresses itself to a smaller range than 965.

Mr. Doney said this bill would clear up disputes between land-owners.

The committee discussed the following bills:

HB 726--Senator Harrison said that this bill was objectionable, in that it would put the Department of Administration in a position of legal advise, and would be able to have a bond referred to their committee for review.

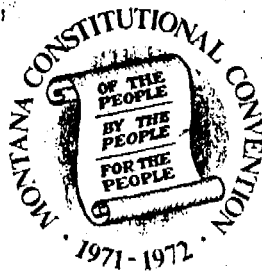
SENATOR HARRISON MOVED THIS BILL BE NOT CONCURRED IN, SECONDED BY SENATOR TURNAGE. MOTION CARRIED UNANIMOUSLY.

HB 818--Senator Gilfeather conferred with Judge Blumberg and they found the bill satisfactory.

SENATOR GILFEATHER MOVED THIS BILL BE CONCURRED IN, SECONDED BY SENATOR HARRISON. MOTION CARRIED UNANIMOUSLY.

No further business the meeting was adjourned to reconvene Thursday on adjournment, February 28.


LUKE MCKEON, Chairman



File

MONTANA CONSTITUTIONAL CONVENTION

STATE CAPITOL • HELENA, MONTANA 59601 • TELEPHONE 406/449-3750

LOUISE CROSS
Delegate, District 3
Chairman:
Natural Resources and
Agriculture Committee

TO: HOUSE NATURAL RESOURCES COMMITTEE
CHAIRMAN: ARTHUR H. SHELDON

FROM: LOUISE CROSS, Chairman, Committee on Natural
Resources and Agriculture, Constitutional
Convention, 1972

RE: HB 1101 as related to Article IX, Sec. 3 (2) Water Rights

Mr. Chairman, Members of the Committee:

In the interim of time when the Delegates to the Constitutional Convention adopted the new document and before it went to the voters of the state, there were many analyses made of the New Constitution.

Although most of the public discussion was centered on other articles in the two months before the election, the provisions of Article IX, and particularly the Water Rights section were considered by a number of analytical writers. It was called a key provision, important to Montana's future.

This was, of course, precisely the conclusion of the committee at the time of its writing and at its adoption. It was quite clear to me, and to most of the committee members, that the development of Montana would hinge directly through the use of its water--whether that development would occur in its major economy of agriculture, its second economy, recreation, or in industry.

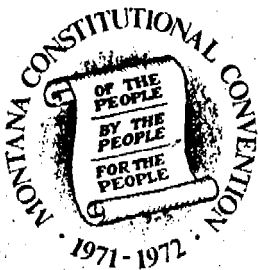
Section 3, subsection 2 (Water Rights) is essentially the same as Sec. 15, Art. III of the 1889 Constitution. When the Natural Resources report went to the Committee of the Whole, the wording was identical. The Committee on Style and Drafting made some minor grammatical revisions which did not alter the meaning of the section as it existed. It was stated at the time, and it was reiterated again by those who studied the section later, that the purpose of the retention of the section was to protect what existed, or what may exist.

The vote on the final consideration by the delegates on this section was 90 to 3.

Have been
Prior to preparing this statement, I spent several hours going through my personal files of notes, records, and correspondence. I wanted to be very careful that my memory was serving me correctly. I was asked what was the intent of the committee on this particular section. My reply has direct bearing on HB 1101, it seems.

I can assure you that it was not the intent of the committee to make it possible for the Getty Oil Co., or any other company, for that matter, to invoke the power of eminent Domain as a constitutional

cont.



MONTANA CONSTITUTIONAL CONVENTION

STATE CAPITOL

HELENA, MONTANA 59601

TELEPHONE 406/449-3750

2.

right. For a private company to declare that collecting and storing water for its own use is a public use, is stretching the imagination beyond all reasonableness. The interpretation is strictly its own and not that of the Con-Con committee, and many of the delegates.

Subsection 2 was retained to preserve the number of court decisions that had been made interpreting the language, and the application of the section.

Further, in my notes, there is nothing that applied subsection 2 to industrial use. Nor do I recall any discussion with the committee that did, either. The over-riding concern was to make sure that sufficient water was available for agricultural use, and that there would be adequate water for domestic and municipal supplies. To interpret this in any other way is erroneous, and I might add, is an intimidating legal maneuver.

Eminent Domain, a power reserved by the people to its representative government, is a power that must be used prudently. Otherwise, it becomes dangerous and oppressive. Precise definitions of what constitutes a public use is essential if private citizens are to have a measure of protection from excessive demands by either industry, or government.

HB 1101 is concerned with precise definitions. And well that it should be. The addition of the underlined words in the bill clarifies, and re-affirms the intent of the language on Water Rights Section 3, subsection 2, Art. IX of the new constitution.

This committee may be interested to know, that I received (middle of a phone call from a gentleman working on the constitutional revision of the Texas constitution. Their committee on natural resources was studying Art. IX in our constitution. While they were very much interested in the environmental section, and land reclamation, there were also some questions about water and water rights. I advised him to do everything in his power to secure the latter. If other states are following our lead, then, as representatives of Montana citizens, you have much to live up to. I sincerely hope that you will do so. Jan.)

Thank you.

Unconstitutionality of House Bill No. 1101

The portion of the bill dealing with reservoir sites is unconstitutional.

The Constitution of 1972 reads in part, Article 9, Section 3:

"Section 3. Water Rights.

(2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right-of-way over the lands of others for all ditches, drains, flumes, canals and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use."

According to the Convention Notes, Subsection (2) to Section 3, Article 9, is the same provision as found in the Constitution of 1899, Article 3, Section 15. Note that the Constitution specifies certain types of "public use," they are:

- (1) The use of water as may be appropriated for sale, rent, or distribution;
- (2) The right-of-way over lands of others for the necessary ditches, flumes, canals and aqueducts used in connection with the sale, rent or distribution of water; and
- (3) Sites for reservoirs necessary for collecting and storing water.

The Legislature can, and has, specified other public uses but at least in connection with water these three items are Constitutionally defined as a "public use."

The Montana Supreme Court has already held that this provision, as stated in the Constitution of 1899, is self-executing and should receive a broad construction. Spratt v. Helena Power Transmission Co., 37 Mont. 60, 94 P. 631 (1908).

In an elaborate discussion whether sites for reservoirs for a public use, the Montana Supreme Court concluded in Helena Power Transmission Company v. Spratt, 35 Mont. 108, 88 P. 773 (1907) that the western states have always taken a very broad view to what is a "public use" for purposes of eminent domain. The condemnee in this case argued that

if there was the slightest possibility of private profit, that the power of eminent domain was not available. The court rejected that argument. The use sought in this case was for a reservoir for a number of purposes, including the generation of electricity, the furnishing of water for sale, rent and distribution to the public generally for the irrigation of lands, the use of electricity for the operation of electric lighting, electric railways for mines and smelters or for any other purpose for which a person might have an application for the power and to use the surplus waters for any other beneficial use.

The court did find in the earlier Helena Power Transmission Company case (35 Mont.108) that because Helena Power and Transmission Company was a foreign corporation, it could not exercise the power of eminent domain. The Legislature then immediately passed a law granting a foreign corporation the right to use the power of eminent domain. The case was again litigated in a later Helena Power Transmission Company case (37 Mont. 60) and the power of a foreign corporation to exercise the power of eminent domain was upheld.

The court has interpreted this provision of the Constitution of 1899,

"* * * in the light of our history and natural conditions in a region where the conservation and use of water is all-important to its development and progress, is a mandate from the sovereign people to the courts, and should receive broad construction." Donich v. Johnson, 77 Mont. 229, at 239, 250 P. 963 (1926).

The impounding of water is a lawful business. Jeffers v. Montana Power Company, 68 Mont. 114, 217 P. 652. Federal Land Bank v. Morris, 112 Mont. 445, 116 P.2d 1007 (1941).

Given the language of the Constitution and given the consistent interpretation of this language by the Montana Supreme Court for more than half a century, it seems unlikely that the mere adding of a phrase in a statute will deprive an activity given public use status in the Constitution of that status.

EMINENT DOMAIN AND THE
PUBLIC USE OF WATER:

Consideration of House Bill No. 1101

Susan Stoeckig
Legislative Intern
to Representative Bob Brown
February 7, 1974

The question of the power of eminent domain has a long and often bitter history. The question again rises in 1974 with regard to the power of private corporations to condemn private lands for the creation of industrial reservoirs. It is to this problem that HB 1101 is specifically addressed. The problem must be given thorough consideration, for it involves a very fundamental constitutionally guaranteed right. William Carl of the School of Law at the University of Montana summarizes this concern:

(The ownership of land satisfies an elemental urge of mankind. Interference with that ownership, no matter how just the cause or how pressing the need, must therefore be approached with great caution. Perhaps the occasionally outrageous demands of landowners, their delaying tactics, and their spirited and uniform opposition to takings generally, spring less from greed and perversity than from some subtle, desperate reaction to the threat of severance from what is theirs.

Condemnation can never be free of rancor, because the protective instinct cuts through the superficial pleasantries. The most it can be is fair and expeditious.)¹

In order to consider HB 1101 in a fair and expeditious manner, three areas must be explored thoroughly: 1) The Montana constitution, 2) Montana statutes, and 3) Case law not only in Montana, but in similar states.

The new Montana constitution limits the power of eminent domain in Article II, Section 29:

Section 29. Eminent domain. Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner. In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails.²

Article IX, Environment and Natural Resources, declares water to be a public use and thereby puts water under the realm of eminent domain.

Section 3. Water rights. (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.

(2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use.

(3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

(4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.³

It is subsection 2 with which we must be specifically concerned. The question becomes one of interpreting public use in relation to this section. It should be noted the 1972 Constitutional Convention did not significantly change Article III, Section 15 of the old constitution in adopting subsection 2. The reasons are noted in the Record of the Con-Con Natural Resources and Agriculture Committee. "Subsection 2 is a verbatim duplication of Article III, Section 15 of the present constitution and has been retained in its entirety to preserve the substantial number of court decisions interpreting and incorporating the language of this Section."⁴ However, in speaking with Ms. Louise Cross, Chairman of that committee, it was discovered that the committee may have intended that subsection 2, the sites for reservoirs

being declared a public use, apply only to agriculture and reservoirs for agricultural purposes. The question might then justifiably be raised as to whether industrial reservoirs are within the intent of the framers of the constitution. In light of the court decisions under this same section in the old constitution (Article III, Section 15), however, there would seem to be little doubt that condemnation for industrial reservoirs has been recognized to be in the public use.

In considering state statutory law, it becomes evident that the right of eminent domain has been granted to private concerns for various purposes deemed to be in the public interest.

93-9902. What are public uses. Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

(4) Wharves, docks, piers, chutes, booms, ferries, bridges of all kinds, private roads, plank and turnpike roads, railroads, canals, ditches, flumes, aqueducts, and pipes for public transportation, supplying mines, mills, and smelters for the reduction of ores and farming neighborhoods with water, and a drainage and reclaiming lands, and for floating logs and lumber on streams not navigable, and sites for reservoirs, necessary for collecting and storing water.

(5) Roads, tunnels, ditches, flumes, pipes, and dumping places for working mines, mills, or smelters for the reduction of ores; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines, mills and smelters for the reduction of ores, also an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines, mills, or smelters for the reduction of ores, and sites for reservoirs necessary for collecting and storing water.

(15) To mine and extract ores, metals or minerals owned by the plaintiff located beneath or upon the surface of property where the title to said surface vests in others.⁵ *← amended -*

93-9903. What estates in lands may be acquired by condemnation. The following is a classification of the estates and rights in lands subject to be taken for the public use.

(1) Such estate or rights as may be necessary up to and including a fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs or dams and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine, or for the mining and extracting of ores, metals, or minerals when the same are owned by the plaintiff but located beneath or upon the surface of property where the title to said surface vests in others, or for the underground storage of natural gas by a natural gas public utility as defined in this act. When the appropriation is for the underground storage of natural gas, all of the right, title, interest and estate in the real property and in the subsand stratum, formation or reservoir so appropriated shall be determinable and for all purposes terminate upon abandonment or upon cessation for the period of one year of the use for which the same was appropriated and thereupon, the ownership of the residue of natural gas therein remaining shall vest in the then owners of such reservoir space.⁶

The "Montana Water Use Act" further clarifies the right of eminent domain in relation to water:

89-865. Short title. This act shall be known and may be cited as the "Montana Water Use Act."⁷

89-866. Declaration of policy and purpose. (1) Pursuant to article IX of the Montana constitution, the legislature declares that any use of water is a public use, and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this act.

(2) A purpose of this act is to implement article IX, section 3(4) of the Montana constitution, which requires that the legislature provide for the administration, control, and regulation of water rights and establish a system of centralized records of all water rights. The legislature declares that this system of centralized records recognizing and establishing all water rights is essential for the documentation, protection, preservation and future beneficial use and development of Montana's water for the state and its citizens, and for the continued development and completion of the comprehensive state water plan.

(3) It is the policy of this state and a purpose of this act to encourage the wise use of the state's water resources by making them available for appropriation consistent with this act, and to provide for the wise utilization, development, and conservation of the waters of

the state for the maximum benefit of its people and the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities which store and conserve waters for beneficial use, for the maximization of the use of those waters for Montana for the stabilization of stream flows, and for groundwater recharge.

(4) Pursuant to article IX, section 3(1) of the Montana constitution, it is further the policy of this state and a purpose of this act to recognize and confirm all existing rights to the use of any waters for any useful or beneficial purpose.⁸

89-867. Definitions. Unless the context requires otherwise, in this act:

(2) "Beneficial use" means a use of water for the benefit of the appropriator, other persons, or the public, including, but not limited to, agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses.⁹

89-1606. Use of water, etc., a public use. The use of all water required for the irrigation of the land of any district formed under the provisions of this act, together with the rights of way for canals and ditches, sites for reservoir, and all property required in fully carrying out the provisions of this act is hereby declared to be a public use, subject to the regulations, and control of the state in the manner prescribed by law; provided, all water, the right to the use of which is acquired by the district under any contract with the United States, shall be distributed and apportioned by the district in accordance with the acts of Congress and rules and regulations of the secretary of the interior, and the provisions of said contract in relation thereto.¹⁰

The right to construct reservoirs is further recognized in 89-820.

89-820. Right to construct dams and raise water - conducting water over lands and railroad rights of way. The right to conduct water from or over the land of another for any beneficial use includes the right to raise any water by means of dams, reservoirs, or embankments to a sufficient height to make the same available for the use intended, and the right to any and all land necessary therefore may be acquired upon payment of just compensation in the manner provided by law for the taking of private property for public use; ...¹¹

< appeal

Other titles grant the power of eminent domain to private corporations also. 50-801 delineates the special procedures for condemna-

tion of rights of way to mines;¹² and 50-813 grants the power to condemn for open pit mining purposes.¹³

It would appear then, that the passage of HB 1101 alone will not eliminate the power of private corporations to condemn for sites for reservoirs. HB 1101 may leave conflicting laws or possible "loopholes" for the corporations under other titles. This would seem to be the case specifically in regards to 89-866 subsection 1, which declares any use of water to be a public use (with court interpretation of the definition of public use it would appear that industry may be considered under public use, especially in relation to the development of natural resources); 89-866 subsection 1, which further subjects water to appropriation for beneficial uses ("beneficial uses" is defined in 89-867 (2) to include industrial and mining); and 89-1606, which declares the use of water to be a public use and further specifies that sites for reservoirs are declared to be a public use. There may also be further conflict in title 93 itself, for in 93-9903 (1) "reservoirs or dams and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine, or for the mining and extracting of ores, metals, or minerals ..." ¹⁴ are declared to be "estates and rights in lands subject to be taken for the public use." ¹⁵ So, although HB 1101 addresses the problem, it does not appear to be the final solution to the problem.

After considering several court decisions, it becomes clear that courts in recent times have ruled for the most part in favor of the mining companies and industry with regard to the power

of eminent domain. The first problem is one of defining public use.

The courts have generally taken one of two approaches to the definition of public use.

While these fundamental propositions are undisputed, there has been difficulty historically in determining what constitutes a public use. There are two principal theories, neither of which, happily, has suffered a full logical extension of its basic premise. The first is that "public use" is equivalent to "use by the public," that the property condemned, be it road, ditch or park, must be for the use of the general public in all cases. Nichols on Eminent Domain, 3d ed., §7.2(1). This narrow view, presently held in a minority of jurisdictions, could logically be extended to include uses of all property which is bound to serve the public, such as hotels. Such extension has not been made, however.

The broader theory is that "public use" can be equated with "public advantage" or "public benefit." It sanctions exercise of the power of eminent domain in aid of activities which are requisite for development of the resources of the state, which create new sources of wealth and employment, or which promote the general welfare. "A public purpose...has for its objective the promotion of the general welfare of all the inhabitants or residents of a given political division..." Rutherford v. City of Great Falls, 107 Mont. 512, 517, 86 P.2d 656 (1939).¹⁶

The majority of the courts have adopted the latter definition of public use, that of public advantage. "According to this concept, it is not essential that the entire community or even any considerable portion thereof should directly enjoy or participate in any improvement so long as the use is for the public benefit."¹⁷ Obviously, however, public use as a public advantage has not been carried to its furthest extension in Montana. "The full scope of the theory of public advantage as the measure of the right to exercise the power has not been realized in Montana. Although it is exercised to aid industries such as mining, such aid is justified as being for an industry, not for individuals. State ex rel. Butte-Los Angeles Mining Co. v. District Court, 103 Mont. 30, 37, 60 P.2d

380 (1936). But public advantage is not exclusively determinative of the right to exercise the power. Thus, the character of a right to use a road, not the extent to which the right is exercised, determines whether the use is public. Komposh v. Powers, supra, at page 502. The courts and the legislature, in theory at least, have not extended the concept of public use to every advantage the public might enjoy from the prosperity of specific industries or activities which come into conflict with less productive uses under a theory of contribution to the general welfare.¹⁸ A court in California, however, has ruled that public use is not synonymous with public advantage. It might be noted that the case involved water rights.

Though the term "public use," as commonly understood, conveys idea that thing or service is dedicated and available to public generally, or that particular property has been acquired for common public good, the term "public use," as used in California doctrine of intervention of a public use, whereby one suing for injunctive relief against invasion of water rights may be relegated to damages, is of more restricted application, and is not to be confused with term "public advantage," but is to be read only against the cases considering that doctrine. Rank v. Krug, D.C. Cal., 142 F.Supp. 1,132.¹⁹

In a number of court decisions it has been ruled that public use is not synonymous with public benefit.²⁰ Reed v. City of Seattle provides an example of court rulings on this issue: "Public use is not synonymous with public benefit, and private property cannot be taken for private use through the exercise of the right of eminent domain, however much the public would benefited thereby. Reed v. City of Seattle, 213 P.923, 925, 124 Wash. 185, 29 A.L.R. 446."²¹

The courts seem to agree that private property cannot be taken

for private use under eminent domain. "An act which attempts to take private property for a private use is unconstitutional."²²

Such taking is a violation of the fourteenth amendment to the constitution of the United States.²³ A Georgia court clarified this stand:

"Public use" as employed in constitutional provision that exercise of right of eminent domain shall never be abridged, nor so construed as to prevent General Assembly from taking property and franchises, and subjecting them to "public use" means that power of eminent domain can never be exercised to acquire property for use by private individuals solely for private use and private gain. Housing Authority of City of Atlanta v. Johnson, Ga., 74 S.E.2d 891, 893, 894, 209 Ga. 560.²⁴

However, if a private individual or corporation condemns lands for the public use and not solely for private gain, the courts have accepted this as a constitutional and legal exercise of the power of eminent domain.

The term "public use" is usually intended to cover a use affecting the public in general, or any number thereof, as distinguished from particular individuals. If the use is in fact a public one, its character is not changed by the fact that the control of the property sought to be taken will be vested in private persons, or private corporations, actuated solely by motives of private gain, and that private purposes will be thereby incidentally served. Little Miami Light, Heat & Power Co. v. White, 5 Ohio N.P., N.S., 201, 204, 52 Wkly.Law Bull.354.²⁵

In deciding eminent domain cases, the question of necessity arises. The question appears to be well settled in Montana.

The degree of necessity implied by the term (Necessary) seems to be well settled in Montana. In Butte, A. & P. Ry. Co. v. Montana U. Ry. Co., 16 Mont. 504, 41 Pac. 232, 245 (1895) it was said of this section:

"... 'necessary,' in this connection, does not mean an absolute or indispensable necessity, but reasonable, requisite, and proper for the accomplishment of the end in view."

This interpretation was approved in Northern Pacific Ry. Co. v. McAdow, 44 Mont. 547, 121 Pac. 473, 475 (1912), and the McAdow holding, in turn, in State Highway Comm. v. Yost Farm

Co., 142 Mont. 239, 384 P. 2d 277 (1963). The Montana interpretation is consonant with the general rule stated in 29 C.J.S. Eminent Domain §90, p.886, approved in California in City of Hawthorne v. Peebles, 166 Cal. App. 2d 758, 333 P.2d 442 (1959).²⁶

Following this guideline, the courts must follow a list of general criteria in determining necessity.

The decision of the court should be based upon the just doctrine of the necessity of the petitioner, founded upon the practicability, economy, facilities, and other considerations which should govern the determination of what necessities may be, always considering the rights of the condemnee, yet never forgetting the benefits to the public. B. A. & P. Ry. v. M. U. Ry., 16 Mont. 504, 541, 542, 41 Pac. 232 (1895). See also: Northern Pac. Ry. Co. v. McAdow et al., 44 Mont. 547, 554, 121 Pac. 473 (1912); State et al. v. Whitcomb et al., 94 Mont. 415, 428, 22 P. 2d 823 (1933).²⁷

The greatest good must be weighed against the least injury in determining necessity.

The evidence should show that the land is reasonably required for the purpose effecting the object of its condemnation. The question of necessity in a given case involves a consideration of facts which relate to the public and also to the private citizen whose property may be injured. The greatest good on the one hand and the least injury on the other are the questions of fact to be determined in passing upon the question of necessity. And, when an attempt is made to show that the location proposed is unnecessarily injurious, the proof should be clear and convincing; otherwise no location could ever be made. State ex rel. Livingston v. District Court, 90 Mont. 191, 196, 300 Pac. 916 (1931).²⁸

Finally, the burden of proof lies with the plaintiff in claiming necessity. "The property rights of a citizen cannot be invaded, even for public purposes, except upon the substantial showing that the invasion is necessary. This necessity must be alleged and proved by the plaintiff. Norther Pac. Ry. Co. v. Mc Adow, 44 Mont. 547, 556, 121 Pac. 473 (1912)."²⁹

It has long been deemed the policy of the state of Montana to foster and encourage the development of the mineral resources of

the state.³⁰ Courts have upheld the private power to condemn for private use in the developing of those mineral resources.

Courts uphold the private power to condemn for a private use where the personal objectives coincide with the public aim of developing resources in those economic areas which most clearly manifest prevalent state interests and aspirations. The power of eminent domain in these cases is delegated to an individual to be exercised in his own behalf, not as an individual, but on account of the expected public purpose he would serve by augmenting the national resources.³¹

The courts are likely to follow Nevada's lead in ruling that anything that furthers the mining development shall be held to be a public use.

Eminent domain for open pit mining was upheld in State ex rel. Standard Slag Co. v. Fifth Judicial District Court, 62 Nev. 113, 143 P.2d 467, 469 (1943) under a statute holding "all mining purposes" to be public uses. At page 467, the court said:

"It is well established in this state that mining, being a paramount industry, is a public use, and the power of eminent domain can be exercised in the furtherance of the development of mines and the extraction and reduction of ores contained therein."

Such is the policy in Montana. Kipp v. Davis-Daly Copper Co., 41 Mont. 509, 110 Pac. 237, 241 (1910). Accordingly it is likely that Montana would follow Nevada in this area.³²

The Supreme Court has chosen not to interfere in this matter. "If the people have found the assistance of mining to be a public use, the supreme court of the United States will not interfere Strickley v. Highland Boy G. M. Co., 200 U.S. 527, 531, 50 L. Ed. 581, 26 S. Ct. 301 (1905)"³³ Logically it follows then, that the condemnation of certain lands for mining uses has been upheld.

In view of Montana's declaration that the assistance of mining is a public use and that of the Supreme Court of the United States sustaining the view there is little ground for doubting the validity of this provision. Condemnation of a tailings dump was upheld in Goldfield Consol. Milling & Transp. Co. v. Old Sandstrom Annex Gold Mining Co., 38 Nev. 426, 150 Pac. 313 (1915), and a tip-

ple site for a coal company in Ketchum Coal Co. v. Pleasant Valley Coal Co., 50 Utah 395, 168 Pac. 86 (1917)³⁴

There have also been rulings that have defined the constitutional grant of water as a public use that is herein being questioned.

Under Const. c.3, § 15, providing that all of the waters that are now appropriated, or may be appropriated hereafter, for any official use, and the right of way over the land of others, for all ditches, etc., be held to be public use, the use of waters to irrigate a tract of land or work a particular mine, though such land or mine is owned by an individual, is a public use. Ellinghouse v. Taylor, 48 P. 757, 758, 19 Mont. 462.³⁵

As some interpret the constitution, it standing alone without statutory law might be sufficient to justify mining's use of eminent domain in relation to water. "article III, §15 of the Montana Constitution makes the beneficial use of water a public use, and that provision standing alone might be sufficient to justify this paragraph in both its mining and irrigation aspects as declaring a proper public use."³⁶

Clearly then, the constitution may be interpreted, through court interpretation, to grant the power of eminent domain in the use of water to private, mining operations. There is, however, a question as to priority of use. Generally, it seems that preference is to be granted to agriculture over industry. Herein may lie the answer for Montana.

In the western states, the existence of water preference provisions also may affect the right of eminent domain. Generally, preferences manifest a policy to favor certain uses of water over other uses and are implemented by either constitutional or statutory provisions. Most of the seventeen contiguous western states have established such preferences; these universally favor domestic and municipal uses over all others, and usually give agricultural uses a higher preference than manufacturing uses.⁷² [See 22 Rocky Mt. L. Rev. 422 (1950); 27 Rocky Mt. L. Rev. 133 (1955); 3 Willamette L.J. 263 (1965)]³⁷

*Agricultural
uses
Granting of
preference
use*

The courts have outlined two questions that must be followed in determining industry's power of eminent domain. "The first such question of necessity is, 'How necessary is the industry benefiting from the condemnation to the economic prosperity of the state?'"³⁸ State courts usually will not impede the movement of industries that are vital to the economy of the state. The Nevada courts have ruled that mining is of economic importance to their state.

The importance of the mining industry to the Nevada economy controlled in Dayton Gold & Silver Mining Co. v. Seawell [11 Nev. 394 (1876)] where a condemnation to facilitate mining was held to be for a public use. The court pointed out that because inherent physical limitations precluded most industries common in other states, mining would have to form the basis of Nevada's economy if the state were to prosper.³⁹

A Georgia court decision makes clear the fact that all industries in a particular state are not viewed with the same favor.

An early Georgia case, Loughbridge v. Harris,⁹⁵ 42 Ga. 500 (1871) held that condemnation of an easement by persons owning the banks on both sides of a stream, to flood upper riparians for the purpose of operating a mill, was unconstitutional as a taking for private use only. Just six years later, however, in Hand Gold Mining Co. v. Parker,⁹⁶ 59 Ga. 419, 424 (1877) the same court held a grant of eminent domain power in the charter of a gold mining company not be invalid as condemnation for a private use. The court rested its decision on the "public good" to be gained because gold mining would "necessarily result in an increase of the constitutional currency of the country, and thereby add to the permanent wealth of the state." Although the court attempted to distinguish the decision from Loughbridge, the most important reason for the inconsistent results appears to be the court's view of the role of the manufacturing industry and the gold mining industry in the economy of Georgia.⁴⁰

Considering previously cited court rulings in Montana, there is no

reason to believe that the courts would reverse themselves and rule that the mining industry was not of vital enough importance to the state that it should not be allowed to retain its power of eminent domain.

"The second question of necessity relating to public use is, 'How necessary is the proposed activity to reasonable prosperity in the industry to be benefited?'"⁴¹ The proof of necessity rulings previously cited apply here. It should also be noted, however, that even though absolute necessity must not be proven and that local determination must be considered, court precedents, established under different conditions also play a role in the answering of this second questions.

Although absolute necessity is not required either as to the importance of the industry or the means of making it successful, it is axiomatic that a higher degree of necessity will present a stronger case for allowing the condemnation. Of course, it does not always follow that an exercise of eminent domain will be allowed upon showing that it is warranted by "local conditions." Such other factors as precedents, often established under different conditions, and purely doctrinal "public use" considerations are also quite important in determining whether an exercise of eminent domain to serve private interests will be allowed.⁴²

In several separate decisions, the courts have ruled that localities are to have the final say in determining necessity in condemnation proceedings. Even though the state may declare the necessity of the development of natural resources, the particulars must still be decided by the local courts and local conditions.⁴³ The Supreme Court has concurred in this view.⁴⁴ Local determination carries such great weight that the Supreme Court has in fact never ruled contrary to a local determination.

Under the broad theory of use as a public benefit, the question of what constitutes a public use is often a local question. "This knowledge and familiarity must have their due weight with the state courts which are to pass upon the question of public use in the light of the facts which surround the subject in their own state." Billings Sugar Co. v. Fish, 40 Mont. 256, 267, 106 Pac. 565 (1910). Nichols, §7.212(1). As a practical matter, the local determination by the states as to what constitutes a public use has been conclusive. Nichols states that the Supreme Court of the United States has never held a use private which the courts of the state, with the concurrence of the legislature of the people, have declared to (37) be public.⁴⁵

An important aspect to be considered about eminent domain in relation to HB 1101 is the power of legislative declaration. The power to declare something to be in the public use rests solely with the legislature.

Generally, it is said that power to initiate the exercise of the power of eminent domain resides exclusively in the legislature. Nichols §3.21. Montana has expressly adopted this view. In State Highway Commission v. Crossen-Nissen Co. 145 Mont. 251, 400 P.2d 283, 284 (1965), the court said:

"The power of eminent domain is vested exclusively in the legislature. It can be exercised only by the legislature, and those agencies to whom the legislature has delegated the power."

} legislative power

See also Helena Power Transmission Co. v. Spratt, 35 Mont. 108, 88 P. 773, 777 (1907); San Joaquin & Kings River Canal & Irrigation Co. v. Stevenson, 164 Cal. 221, 128 Pac. 924, 925 (1912). Without some act of delegation on the part of the legislature, therefore, there is no authorized condemnor except the legislature. In this broad sense, then, the legislature must act before the delegatee of the power has any of the powers of a condemnor.⁴⁶

Just as the initial determination rests with the legislature, so does the extent of application of public use.

Whether the power of eminent domain shall be put in motion for any particular purpose, and whether the exigencies of the occasion and the public welfare require or justify its exercise, are questions which rest entirely with the legislature. The use for which

land is to be taken having been determined to be a public use, the quantity which shall be taken is a legislative question. State et al., v. Aitchison et al., 96 Mont. 335, 30 P 2d 805, (1934).⁴⁷

Thus, even though the constitution declares waters to be a public use, the legislature must execute the meaning of the constitution.

The Colorado provision, which declares that "All persons and corporations shall have the right of way ... [for certain uses] upon payment of just compensation" is "self-executing" and apparently is effective without any legislative action. But not all of the constitutional provisions have such an effect, perhaps because they are not so explicit in conferring the power - they merely declare certain uses to be public or approve condemnation for private uses... [And the provision in the Montana Constitution, although said to be "self-executing," apparently requires that the legislature determine whether the power should in a given instance be exercised, who should exercise it, and what property should be taken. In other words, the provision contains no grant of power. (State v. Aitchison, 96 Mont. 335, 30 P.2d 805 (1934).⁴⁸]

Self-executing

The Montana constitution is not "self-executing."

There is disagreement, however, as to whether the final determination rests with the legislature or with the courts. Several opinions suggest that the determination of the legislature is not final. The ultimate question of whether a particular use is public or not must be decided judicially.⁴⁹ It is probably best that the courts decide the matters, for they appear to be in the best position to make the final determination.

Thus the court is the arbiter of uses, as it should be, because (1) public use is ultimately a matter for judicial determination, and (2) the court is in the best position to analyze the comparative necessity of uses competing under specific conditions for specific property.⁵⁰

The Supreme Court has declared that the courts must ultimately decide as to what are public uses, even though the power of designation lies with the legislature.

"The legislature may designate a use as public, but ultimately the courts must decide whether the use so declared is in fact public.

Menlo Park v. Artino, 151 Ca. App. 2d 261, 311 P.2d 135 (1957);

Rindge Co. v. Los Angeles, 262 U.S. 700, 705, 67 L.Ed. 1186, 43

S.Ct. 689 (1923).⁵¹ Montana's courts have complied with this precedent.

The legislature cannot, by its mere fiat, transform that which is in truth a private use into a public use, but must leave to the courts the determination as to whether a particular use is public or private. The court, must, among other things, by statute, in a condemnation proceeding, determine whether or not the use for which the property is sought to be appropriated is a public use, within the meaning of the laws of the state. Komposh v. Powers, et al., 75 Mont. 493, 244 Pac. 298 (1926), affirmed (1927) Powers v. Komposh, 48 S Ct. 156, 275 U.S. 504, 72L. Ed. 396.⁵²

However, the question is not as clearly decided as might be inferred from the above citations. Disagreement is raised by Clark:

"As distinguished from public purpose, the extent of public necessity for construction of an improvement and its location are legislative questions and not subject to judicial review. [North Laramie Land Co. v. Hoffman, 268US276, 69L. Ed. 953, 45 Sup. Ct. 491

(1925)]⁵³ The question has not been resolved; however, recent Montana court decisions point to the fact that the courts have been reluctant to interfere with legislative determinations.

While a legislative declaration alone that a use is a public use is not conclusive, Komposh v. Powers, supra, at page 502, the courts are reluctant to interfere with a legislative declaration in the absence of a clear showing that the legislature was wrong. The legislative finding is entitled to great weight. Rutherford v. City of Great Falls, supra, at page 517. The existence of public interest when the legislature speaks is well-nigh conclusive. Berman v. Parker, 348 U.S. 26, 32, 99 L.Ed. 27, 75 S. Ct. 98 (1954).⁵⁴

In light of the conflict of HB 1101 with the Montana constitution, the question of the legislative role in determining what may be held to be a public use becomes very important. Although the question of legislative v. judicial determination has not been settled, a fairly sound case may be built on the side of the legislature. This would probably be the best approach to the resolution of the constitutional difficulties of HB 1101.

In conclusion, HB 1101 will most probably not settle the problem of eminent domain as exercised by industry and mining in the eastern part of the state for several reasons: 1) 93-9902 is not the only section of the law dealing with this problem; 2) the courts have ruled in favor of industry and mining in the past (court precedent is well established); 3) although the legislature has certain powers for the declaration of public use, the final determination seems to lie with the courts. However, HB 1101 does address the problem, may be the correct interpretation of the public use of water as intended by the last Constitutional Convention, and makes clear the intentions of the legislature of the use of eminent domain in relation to water. The final solution of the problem, as well as the final effect of HB 1101, can only be determined by the courts.

FOOTNOTES

1. Eminent Domain: A Research Report. Prepared by the School of Law, University of Montana for the Montana State Highway Commission. November 1967, p.253
2. The 1972 Constitution of the State of Montana, Article II, Section 28.
3. Ibid., Article IX, Section 3.
4. Montana Constitutional Convention 1971-72. Natural Resources & Agriculture Committee Proposal, Comments on majority proposal. No. VI, Feb. 18, 1972, p.10.
5. Title 93 R.C.M., Section 9902.
6. Title 93 R.C.M., Section 9903.
7. Title 89 R.C.M., Section 865.
8. Title 89 R.C.M., Section 866.
9. Title 89 R.C.M., Section 867.
10. Title 89 R.C.M., Section 1606.
11. Title 89 R.C.M., Section 820.
12. Title 50 R.C.M., Section 801.
13. Title 50 R.C.M., Section 813.
14. Title 93 R.C.M., Section 9903 (1).
15. Title 93 R.C.M., Section 9903.
16. Eminent Domain: A Research Report, op cit., pp.35-36.
17. Willis P. Rokes, An Analysis of Property Valuation Systems Under Eminent Domain. Occasional Paper No. 5, January 1961. Bureau of Business and Economic Research, School of Business Administration, Montana State University, Missoula, Montana. pp.16-17
18. Eminent Domain: A Research Report, op cit., p.37.
19. Rank v. Krug, D.C. Cal., 142 F. Supp.1, 132.
20. Wisconsin River Imp Co. v. Pier, 118 N.W. 857, 862, 137 Wis. 325, 21 L.R.A., N.S., 538.; Abolt v. City of Fort Madison, 108 N.W. 2d 263, 266, 267, 268, 252 Iowa 626.; Ferguson v. Illinois Cent. R. Co., 210 N.W. 604, 606, 202 Iowa, 508.; Avery v. Vermont Electric Co., 54 A. 179, 75 Vt. 235, 50 L.R.A. 817.; Smith v. Cameron, 210 P. 716, 720, 106 On. 1, 27 A.L.R. 510.

21. Reed v. City of Seattle, 213 P.923, 925, 124 Wash. 185, 29 A.L.R. 446.
22. Eminent Domain: A survey of Montana Case Law. Compiled for the Highway Commission of the State of Montana by Legal Department, Right-of-Way Division. Helena, Montana. September 15, 1960, p.8.
23. Komposh v. Powers, 75 Mont. 493, 500 244 Pac. 298, aff'd 275 U.S. 504, 72 L.Ed. 396, 48 S. Ct. 156 (1926).
24. Housing Authority of City of Atlanta v. Johnson, Ga., 74 S.E.2d 891, 893, 894, 209 Ga. 560.
25. Little Miami Light, Heat & Power Co. v. White., 5 Ohio N.P., N.S., 201, 204, 52 Wkly Law Bull. 354.
26. Eminent Domain: A Research Report, op. cit., pp.98-99
27. Eminent Domain: A Survey, op. cit., pp.42-43
28. Ibid., p.45.
29. Ibid.
30. Kupp v. Davis-Daly Copper Co., 41 Mont. 509, 110 Pac. 237, 241, (1910).
31. Robert Emmet Clark, Ed. Water and Water Rights. Volume four, chapter 16, Eminent Domain and Water. Indianapolis: The Allen Smith Company, 1970. p.74.
32. Eminent Domain: A Research Report, op. cit., p.60.
33. Ibid., p.50.
34. Ibid., pp.51-52.
35. Ellenghouse v. Taylor, 48 P.757, 758, 19 Mont. 462.
36. Eminent Domain: A Research Report, op. cit., p.50.
37. Clark, op. cit., p.77
38. Ibid., p.81.
39. Ibid.
40. Ibid., pp.81-82.
41. Ibid.
42. Ibid., pp.82-83.

43. Ibid., p.83.
44. Louisiana Power & Light Co. v. City of Thixodaux, 360 U.S. 25, 27, 3 L.Ed. 2d 1058, 1061, 79 Sup. Ct. 1070, 1072 (1959).
45. Eminent Domain: A Research Report, op.cit., p.36.
46. Ibid., p.106.
47. Eminent Domain: A Survey, op. cit., p.9.
48. Clark, op. cit., p.76.
49. Eminent Domain: A Survey, op. cit., p.9
50. Clark, op. cit., p.97.
51. Ibid., p.96.
52. Eminent Domain: A Survey, op. cit., p.8.
53. Clark, op. cit., p.8.
54. Eminent Domain: A Research Report, op. cit., p.37

HB 901--SENATOR BOYLAN MOVED THIS BILL BE NOT CONCURRED IN; SECONDED BY SENATOR ROMNEY. MOTION CARRIED UNANIMOUSLY.

HB 943--SENATOR BOYLAN MOVED THIS BILL BE NOT CONCURRED IN; SECONDED BY SENATOR DRAKE. MOTION CARRIED UNANIMOUSLY.

HB 965--Senator Turnage said that this bill had some geographic problems. He said that it would have to comply with all local requirements before they would be able to condemn the land on state standards. He said he would agree with uniform standards, and felt that this was not uniform.

SENATOR HARRISON MOVED THIS BILL BE NOT CONCURRED IN; SECONDED BY SENATOR TURNAGE. MOTION CARRIED.

HB 999--SENATOR TURNAGE MOVED TO AMEND SS 2, PAGE 9, LINE 9, BY STRIKING SS 2 IN ITS ENTIRETY; SENATOR DRAKE SECONDED. MOTION CARRIED. He did not feel the child should be held responsible for giving misinformation if he didn't really know what he was talking about.

SENATOR DRAKE MOVED TO AMEND SS 4, PAGE 3, LINES 15-23 BY STRIKING THIS SECTION IN ITS ENTIRETY; SECONDED BY SENATOR TURNAGE. MOTION CARRIED.

SENATOR TURNAGE MOVED THIS BE CONCURRED IN AS AMENDED. SECONDED BY SENATOR DRAKE. MOTION CARRIED.

HB 1003--SENATOR DRAKE MOVED THIS BILL BE CONCURRED IN; SECONDED BY SENATOR BOYLAN. MOTION CARRIED UNANIMOUSLY.

HB 1009--SENATOR TURNAGE MOVED THIS BILL BE CONCURRED IN; SECONDED BY SENATOR HARRISON. MOTION CARRIED UNANIMOUSLY.

HB 1017--Senator Turnage said that he still had a question on the "grandfather clause". Senator McNamer questioned the acreage limitation, and the general consensus of the Committee was to set it at less than 20 acres.

The Committee recommended to hold the bill pending amendments.

HB 1024--SENATOR HARRISON MOVED THAT THIS BILL BE NOT CONCURRED IN, UNDER THE STIPULATION THAT IT BE PLACED INTO AN INTERIM STUDY BY WAY OF A RESOLUTION; SENATOR DRAKE SECONDED. MOTION CARRIED UNANIMOUSLY.

HB 1035--HOLD IN COMMITTEE

HB 1090--SENATOR DRAKE MOVED THIS BILL BE NOT CONCURRED IN; SECONDED BY SENATOR HARRISON. MOTION CARRIED UNANIMOUSLY.

HB 1101--SENATOR GILFEATHER MOVED THIS BILL BE CONCURRED IN; SECONDED BY SENATOR HALL. MOTION FAILED

SENATOR TURNAGE MOVED THIS BILL BE NOT CONCURRED IN; SECONDED BY SENATOR HARRISON. MOTION CARRIED.

ROLL CALL

SENATE JUDICIARY COMMITTEE

SECOND HALF - 43rd LEGISLATIVE SESSION 1974

Date 3/6
11 a.m.

NAME	PRESENT	ABSENT	EXCUSED
Luke McKeon	✓		
Pat Gilfeather	✓		
Paul Boylan	✓		
Mrs. Boots Hall	(late) ✓		
Miles Romney	✓		
Glenn Drake	✓		
Tom Harrison	✓		
Jim Moore			✓
Jean Turnage	(late) ✓		

COMMITTEE ON JUDICIARY (executive meeting) BILL NO.

VISITOR'S REGISTER

[illegible]

HB 1041--Senator McKeon commented that this bill would place a criminal status on any disseminating of information, and that this bill would only allow audit of state banks, not federal banks.

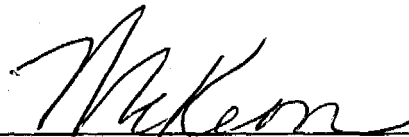
SENATOR HARRISON MOVED THIS BILL BE NOT CONCURRED IN; SECONDED BY SENATOR MOORE. MOTION CARRIED UNANIMOUSLY.

HB 1101--SENATOR HARRISON RECOMMENDED THAT THE COMMITTEE RECONSIDER THEIR ACTION ON HB 1101. THE COMMITTEE AGREED. Senator Harrison said that he discussed the bill with interested legislators and lobbyists, and recommended amendments as per attached standing committee report.

SENATOR HARRISON MOVED THE AMENDMENTS BE CONCURRED IN; SECONDED BY SENATOR MOORE. MOTION CARRIED UNANIMOUSLY.

SENATOR HARRISON MOVED THIS BILL BE CONCURRED IN AS AMENDED; SECONDED BY SENATOR MOORE. MOTION CARRIED UNANIMOUSLY.

There being no further business, the meeting was adjourned at 12:45 p.m. this afternoon on adjournment of the Senate.

A handwritten signature in dark ink, appearing to read 'McKeon', is written over a horizontal line.

LUKE McKEON, Chairman

ROLL CALL

SENATE JUDICIARY COMMITTEE

SECOND HALF - 43rd LEGISLATIVE SESSION 1974

Date: 3-7-74
11 a.m.

NAME	PRESENT	ABSENT	EXCUSED
Luke McKeon	✓		
Pat Gilfeather	✓		
Paul Boyland	✓		
Mrs. Boots Hall	✓		
Miles Romney	✓		
Glenn Drake	✓		
Tom Harrison	✓		
Jim Moore	✓		
Jean Turnage	✓		

(3) persons in state institutions principally for the purpose of training, but who receive compensation;

(4) independent contractors unless written contract specifies the creation of an employer-employee relationship for purposes of retirement coverage under the Public Employees' Retirement System Act;

(5) employees serving in employment which does not exceed the equivalent of sixty (60) working days in any fiscal year;

(6) employees in service on July 1, 1945, or prior thereto who filed with the board of administration an election not to become members; provided, any person so excluded from membership by his own election may become a member by meeting the requirements of the balance of this subsection. Such a person must file an election to become a member with the board of administration no later than July 1, 1975; provided, that any such person who is not an employee on July 1, 1974, may make such filing no later than one (1) year after subsequently becoming an employee. In either event, such person must thereupon pay to the retirement system the amount which he and his employer would have contributed had he not been so excluded plus interest which would have accumulated thereon. All benefits payable thereafter to such person shall be the same as if such person had never filed an election not to be a member;

(7) persons directly appointed by the governor, who do not file with the board of administration an election in writing to become members;

(8) persons who are members of any other retirement or pension system supported wholly or in part by funds of the United States government, any state government or political subdivision thereof and who are receiving credit in such other system for service, it being the purpose of this section to prevent a person from receiving credit for the same service in two (2) retirement systems supported wholly or in part by public funds, and no person shall receive such credit under any circumstances; any member of the retirement system who, because of his employment by the state, shall be required to become a member of any such other systems, shall be considered solely for the purposes of making normal contributions as permanently separated from service; the accumulated contributions of any member who shall have died after becoming a member of such other system and before receiving said accumulated contributions, shall be paid to the beneficiary nominated by him to receive any death benefit payable under section 68-2301; employer contributions on the basis of compensation earned by members after the effective date of termination of membership herein because of the membership in such other system, shall be repaid to the employer; for the purpose of this section, persons receiving pensions, retirement allowances or other payments, from any source, on account of employment other than as an employee as defined in this act, shall not be considered, because of such receipt, members of any other retirement or pension system; *provided, however, that where an employer has entered into a collective bargaining agreement which includes provisions for payments or contributions by the employer in lieu of wages to a retirement or pension plan qualified by the Internal Revenue Service for its employees, such employees shall remain eligible, if otherwise qualified, for membership in the retirement system, and the payments or contribu-*

tions in lieu of wages shall not be deemed a part of the employee's compensation for purposes of computing the employer or employee contributions to the retirement system;

(9) court commissioners or appointive members of any board or commission who serve the state or any contracting employer intermittently and who are paid on a per diem basis;

(10) persons who become employees after they have reached their sixtieth birthday and have no creditable service in this system, and who do not file with the board of administration an election to become members;

(11) employees of county hospitals or county rest homes in the sixth and seventh class counties unless they elect to file with the board of administration an election in writing to become members."

Approved March 29, 1974

CHAPTER NO. 375

AN ACT REVISING THE LIST OF PUBLIC USES FOR WHICH THE RIGHT OF EMINENT DOMAIN MAY BE EXERCISED, AND AMENDING SECTION 93-9902, R.C.M. 1947.

Be it enacted by the Legislature of the State of Montana:

Section 1. Section 93-9902, R.C.M. 1947, is amended to read as follows:

"93-9902. **What are public uses.** Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

1. All public uses authorized by the government of the United States.
2. Public buildings and grounds for the use of the state, and all other public uses authorized by the legislative assembly of the state.
3. Public buildings and grounds for the use of any county, city, or town, or school districts; canals, aqueducts, flumes, ditches, or pipes conducting water, heat, or gas for the use of the inhabitants of any county, city, or town; raising the banks of streams, removing obstructions therefrom, and widening, deepening, or straightening their channels; roads, streets, and alleys, and all other public uses for the benefit of any county, city, or town, or the inhabitants thereof, which may be authorized by the legislative assembly; but the mode of apportioning and collecting the costs of such improvements shall be such as may be provided in the statutes or ordinances by which the same may be authorized.
4. Wharves, docks, piers, chutes, booms, ferries, bridges, of all kinds, private roads, plank and turnpike roads, railroads, canals, ditches, flumes,

aqueducts, and pipes for public transportation, supplying mines, mills, and smelters for the reduction of ores and farming neighborhoods with water, and drainage and reclaiming lands, and for floating logs and lumber on streams not navigable, and sites for reservoirs, necessary for collecting and storing water. *Provided, however, that such reservoir sites must possess a public use demonstrable to the district court as the highest and best use of the land.*

5. Roads, tunnels, ditches, flumes, pipes, and dumping places for working mines, mills, or smelters for the reduction of ores; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines, mills and smelters for the reduction of ores, also an occupancy in common by the owners or the possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines, mills, or smelters for reduction of ores, and sites for reservoirs necessary for collecting and storing water. *Provided, however, that such reservoir sites must possess a public use demonstrable to the district court as the highest and best use of the land.*

6. Private roads leading from highways to residences or farms.

7. Telephone or electric light lines.

8. Telegraph lines.

9. Sewerage of any city, county, or town, or any subdivision thereof, whether incorporated or unincorporated, or of any settlement consisting of not less than ten (10) families, or of any public buildings belonging to the state, or to any college or university.

10. Tramway lines.

11. Electric power lines.

12. Logging railways.

13. Temporary logging roads and banking grounds for the transportation of logs and timber products to public streams, lakes, mills, railroads, or highways, for such time as the court or judge may determine; provided, the grounds of state institutions be excepted.

14. Underground reservoirs suitable for storage of natural gas.

15. To mine and extract ores, metals or minerals owned by the plaintiff located beneath or upon the surface of property where the title to said surface vests in others; provided, however, the use of the surface for strip mining or open pit mining of coal (i.e., any mining method or process in which the strata or overburden is removed or displaced in order to extract the coal) is not a public use and eminent domain may not be exercised for this purpose."

Approved March 29, 1974

CHAPTER NO. 376

AN ACT TO AMEND SECTIONS 84-202 AND 84-301, R.C.M. 1947, TO

EXEMPT FROM TAXATION HOUSEHOLD GOODS AND PERSONAL PROPERTY USED FOR PERSONAL OR DOMESTIC PURPOSES; AND PROVIDING AN EFFECTIVE DATE.

Be it enacted by the Legislature of the State of Montana:

Section 1. Section 84-202, R.C.M. 1947, is amended to read as follows:

"84-202. **Exemptions from taxation.** (1) The property of the United States, the state, counties, cities, towns, school districts, municipal corporations, public libraries, such other property as is used exclusively for agricultural and horticultural societies, for educational purposes, places of actual religious worship, hospitals and places of burial not used or held for private or corporate profit, and institutions of purely public charity, evidence of debt secured by mortgages of record upon real or personal property in the state of Montana, and public art galleries and public observatories not used or held for private or corporate profit, are exempt from taxation, but no more land than is necessary for such purpose is exempt; provided, the term "institutions of purely public charity" as used in this act shall include organizations owning and operating facilities for the care of the retired or aged or chronically ill which are not operated for gain or profit; provided, that the terms public art galleries and public observatories used in this act shall mean only such art galleries and observatories whether of public or private ownership, as are open to the public, without charge or fee at all reasonable hours, and are used for the purpose of education only, and also when a clubhouse or building erected by or belonging to any society or organization of honorably discharged United States soldiers, sailors or marines who served in army or navy of United States, is used exclusively for educational, fraternal, benevolent or purely public charitable purposes, rather than for gain or profit, together with the library and furniture necessarily used in any such building, and all property, real or personal, in the possession of legal guardians of incompetent veterans of the World War or minor dependents of such veterans, where such property is funds or derived from funds received from the United States as pension, compensation, insurance, adjusted compensation, or gratuity, shall be exempt from all taxation as property of the United States while held by the guardian, but not after title passes to the veteran or minor in his or her own right on account of removal of legal disability.

(2) *All household goods and furniture, including clocks, musical instruments, sewing machines, wearing apparel of members of the family actually used by the owner for personal and domestic purposes, or for furnishing or equipping the family residence are exempt from taxation."*

Section 2. Section 84-301, R.C.M. 1947, is amended to read as follows:

"84-301. **Classification of property for taxation.** For the purpose of taxation the taxable property in the state shall be classified as follows:

Class One. The annual net proceeds of all mines and mining claims, after deducting only the expenses specified and allowed by section 84-5403; also where the right to enter upon land, to explore or prospect,